COURT OF SESSION.

Tuesday, May 20.

SECOND DIVISION.

GRANT, PETITIONER.

Process—Poor—Form of Note for Remit to Reporters on Probabilis Causa Litigandi—*A.S., 21st Dec.* 1842.

Robert Grant presented a note to the Second Division craving a remit to the reporters on the *probabilis causa litigandi* to consider his application for admission to the poor's roll. He stated in his note—"The petitioner being desirous of admission to the poor's roll to enable him to carry on a lawsuit against the Parochial Board of Abernethy," but did not state the nature of the proposed action. The respondent objected that the note was incompetent in respect that the nature of the proposed action was not stated therein, and quoted the case of *Duncan*, January 28, 1846, 8 D. 411.

The Court ordered the petition to be amended to the effect of stating the nature of the action.

Counsel for Petitioner—Gardner. Agent—R. J. Finlay, S.S.C.

Counsel for Respondents—Guthrie. Agents—John C. Brodie & Sons, W.S.

Wednesday, May 21.

FIRST DIVISION.

[Sheriff of Forfarshire.

WYLIE *v.* KYD.

Bankruptcy—Sheriff—Review of Sheriff's Interlocutor pronounced in Proceedings before Appointment of Trustee — Bankruptcy Act 1856 (19 *and* 20 *Vict. c.* 79), *secs.* 71 *and* 170.

Held competent to appeal to the Court of Session an interlocutor of a Sheriff pronounced before the appointment of a trustee in a sequestration, by which proof was allowed to a competitor for the trusteeship of his objections to the votes of the creditors who supported his opponent. *Tennent* v. *Crawford*, Jan. 12, 1878, 5 R. 433, followed.

In a competition for the office of trustee on the sequestrated estate of John Ogilvy, farmer, George Kyd, competitor for the office of trustee, objected to the votes of all the creditors who supported the election of James Wylie, who had been also nominated for the office at the first general meeting of creditors on 25th April 1884. The ground of objection was that the several creditors were not put on oath by the justices of the peace before whom their affidavits bore to have been sworn.

The Sheriff-Substitute (Brown Douglas) on 5th May 1884 pronounced this interlocutor:—"Allows to the competitor Kyd a proof of his objections—that the several deponents in the affidavits produced were not put on oath by the justices of the peace before whom it is said the oaths were taken; and to the competitor Wylie a conjunct probation."

Wylie appealed to the Court of Session.

The Bankruptcy Act 1856, sec. 71, provides—"The judgment of the Sheriff declaring the person or persons elected to be trustee or trustees in succession shall be given with the least possible delay; and such judgment shall be final, and in no case subject to review in any court or in any manner whatever." The 170th section provides—"It shall be competent to bring under the review of the Inner House of the Court of Session . . . any deliverance of the Sheriff after sequestration has been awarded (except when the same is declared not to be subject to review) . . . and it shall be competent to the Inner House . . . to remit to the Sheriff with instructions."

The respondent objected to the competency of the appeal on the ground that the interlocutor of a Sheriff determining the competition for a trusteeship was final, and it followed necessarily that an interlocutor determining the validity of the votes given for competitors must also be final. Obviously that would be so if the Sheriff determined on the validity of the votes and decided the competition in the same interlocutor.—*Galt* v. *Macrae*, June 9, 1880, 7 R. 888; and Lord Shand in *Tennent* v. *Crawford, infra.*

Authorities for appellants—*Tennent* v. *Crawford*, January 12, 1878, 5 R. 433, and cases cited there; *Reid* v. *Drummond*, November 15, 1879, 7 R. 235.

Lord President—This point is settled by a series of decisions, and we are bound to follow them.

Lord Mure and Lord Adam concurred.

The Court repelled the objection to the competency of the appeal, and sent the case to the roll.

Counsel for the Appellants — M'Kechnie. Agent—P. S. Malloch, S.S.C.

Counsel for the Respondent—Watt. Agent—David Milne, S.S.C.

Wednesday, May 21.

SECOND DIVISION.

[Lord Fraser, Ordinary.

BROWN *v.* CARTWRIGHT AND OTHERS (STIRLING MAXWELL'S EXECUTORS).

(*Ante*, vol. xx. p. 818, July 17, 1883.)

Succession — Testament — Legacy—Master and Servant—"Domestic Servant."

A testator by holograph will left legacies to his factor, butler, coachman, housekeeper, and "to each of my other servants who shall be in my service at the time of my death, and who shall have been with me for four years, one year's wages." Opposite to each legacy to a person named there was pencilled on the margin the amount in figures, while

opposite the last-mentioned provision there was—"say £1000." None of these marginal notes were signed. It was proved that if the legacy of a year's wages was given only to domestic servants who had been four years in the testator's service at the time of his death, the amount required to satisfy them would have been only £257, while if it were extended to every class of servants who fulfilled that condition the amount required would have been £4338, 16s. *Held* (*rev.* judgment of Lord Fraser) that a blacksmith who was hired at a weekly wage, and who had been four years in testator's service at the time of his death was one of the class of servants whom the testator intended to benefit, and was entitled to payment of a legacy of a year's wages out of his estate.

Writ—Unsigned Marginal Note.

A testator by holograph will, after certain specific legacies to certain servants in his employment by name, made this provision—"to each of my other servants who shall be in my service at the time of my death, and who shall have been with me for four years, one year's wages." Opposite this provision, on the margin, there was written "say £1000," unsigned. A question having arisen as to the class of servants whom the testator intended to benefit—*Opinions* (*per* Lord Young and Lord Craighill) that it was incompetent to regard this marginal note as interpreting the will.

Sir William Stirling Maxwell, Bart., of Keir and Pollok, died in 1878. By his will (which was holograph), dated in 1875, he left and bequeathed his whole property and estate, real and personal, to his two sons, subject to the payment of certain legacies. He appointed certain persons as executors of his will. After some legacies to various relatives there occurred the following—"I also bequeath to Alexander Young, my factor, four thousand pounds, in testimony of my regard and of my sense of his long and faithful service and friendship.

"To Thomas Saddler, my butler, three hundred pounds.

"To George Crowson, my butler at 10 Upper Grosvenor Street, five hundred pounds.

"To Thomas Mott, my coachman, five hundred pounds.

"To Mrs Cairns, my housekeeper, three hundred pounds.

"To each of my other servants who shall be in my service at the time of my death, and who shall have been with me for four years, one year's wages."

On the margin, opposite each of these specific legacies, there was marked in pencil the amount of each legacy in figures and opposite the final bequest above quoted—"To each of my other servants," &c., there was written, also in pencil, the words "say £1000."

Sir William left at his death large property, both heritable and movable. The executors proceeded to pay the legacies bequeathed by the testator, and in pursuance of that last above quoted, of a year's wages "to each of my other servants," &c., they paid away sums amounting in all to £936. The persons to whom these payments to the amount of a year's wages each were made included certain domestic servants, and also two gardeners, three gamekeepers, a carpenter (whose yearly wage, the highest on the list, amounted to £100), a forester, a farm grieve, and three land overseers.

The present action was raised by Thomas Brown against the executors for payment of £59, 16s. He averred (which was not disputed by the defenders) that at the time of Sir William's death he was and had been for more than four years previously in his service as a blacksmith at a weekly wage of £1, 3s., payable and paid on the first day of each month. He claimed to fall within the description in the above-quoted provision "to all my other servants." The executors maintained that the pursuer was not in the category of servants thereby provided for, and refused to recognise his claim for a year's wages. They founded on the pencil markings above referred to as indicating approximately the limits of the bequests, explaining that the yearly wages payable on Keir were £2961, 12s., and on Pollok £1397, 4s., making together £4338, 16s., or more than four times the amount of the legacy as estimated by the testator.

The pursuer pleaded—"(2) On a sound construction of the said holograph will and codicil, the pursuer is entitled, as one of the servants, or at all events as one of the yearly servants, of the late Sir William Stirling Maxwell, to the legacy provided under the said deed, being equivalent to one year's wages. (2) The alleged pencillings on the will cannot competently be considered, and all the defences being irrelevant and in all material respects unfounded, the pursuer is entitled to decree."

The defenders pleaded—"(6) On a sound construction of the said will of the late Sir William Stirling Maxwell, the pursuer does not come within the category of 'servants' for whom provision is thereby made."

The Lord Ordinary, after a proof of the averment that the pencil writing on the margin was in the handwriting of Sir William, pronounced this interlocutor:—"Finds that the now deceased Sir William Stirling Maxwell, by his last will and testament, bequeathed legacies to Alexander Young, his factor; Thomas Saddler, his butler; to George Crowson, his butler; to Thomas Mott, his coachman; to Mrs Cairns, his housekeeper, and 'to each of my other servants who shall be in my employment at the time of my death, and who shall have been with me for four years, one year's wages:' Finds that the pursuer of this action was in the service of Sir William Stirling Maxwell as a blacksmith, on a yearly hiring, and had been so for four years prior to Sir William Stirling Maxwell's death: Finds that his wages were paid on the 1st of every month, at the rate of 23s. weekly: Finds that he is not a servant within the meaning of the bequest to servants to whom a year's wages was bequeathed: Therefore assoilzies the defenders, the executors of Sir William Stirling Maxwell, from the conclusions of the summons, &c.

"*Opinion.*—There can be no question that the pursuer was a servant of Sir William Stirling Maxwell at the time of the latter's death; but it does not follow that he comes within the class to whom the legacy is bequeathed. It appears to the Lord Ordinary that the testator used the word 'servants' in the social rather than the

legal meaning of the term. No doubt the pursuer fulfils in one important particular the description of a servant in a bequest to that class. There was a contract between the testator and him, which entitled the former to the service of the pursuer during every part of the yearly term for which he contracted to serve, which distinguishes this case from certain English cases, where the claimant for the legacy was in the employ of the testator merely in consequence of an agreement between the testator and another person, and the servant was not only in the employ of the testator, but in that of the person contracted with. This was the case of a coachman who was provided for the testator by a jobmaster, together with a carriage and horses, in the usual course of business. It was held that he was not a servant within the intent and meaning of the will (*Chilcot* v. *Bromley*, 12 Ves. 114). Nor is the legacy in the present case controlled by a distinguishing adjective, confining the generality of the word 'servants' to a particular class, such as occurred in *Ogle* v. *Morgan* (1 De Gex, M. and G. 359), where Lord Truro held that a head gardener who lived in one of the testator's cottages, and was not dieted by him, was not entitled, under a bequest of a year's wages 'to each person as a servant in my *domestic* establishment at the time of my decease.' The same qualifying word 'domestic' servant occurred in the will of a person who (*M'Intyre* v. *Fairrie's Trustees*, 12th November 1863, 2 Macph. 94) had bequeathed to 'each of my domestic servants, male and female, in my service at the time of my death, £25.' It was held that 'a woman who took charge of the place of business of a firm, of which the testator was a leading partner, served him daily with his luncheon there, and occasionally went to his residence to assist when there was company, was a domestic servant of the testator within the meaning of the bequest.'

"Sir William Stirling Maxwell did not use the word '*domestic*,' but the Lord Ordinary thinks that he meant it; and that the legacy must be confined to that class of servants. The main ground upon which this conclusion is reached, is the fact that Sir William after writing his will in ink, proceeded to make a calculation on the margin, in pencil, as to the amount of the legacies he had bequeathed. Opposite each bequest he puts the figure on the margin, and adds up the total. It is of no moment that the figures on the margin are in pencil and not in ink, it being now settled that a will written in pencil is valid (*Muir*, 8 Macph. 53; *Simsons* v. *Simsons*, 10 R. 1247), and if so, any declaration of intention, though in pencil, cannot be rejected. Nor is it of any moment that the marginal figures are not signed. They are proved to be holograph. Now, opposite to the bequest of a year's wages to the 'other servants' besides those named, he uses these words, 'say £1000.' It is proved that if, besides domestic servants, there were included all out-door labourers and mechanics in his employment, the executors would require to disburse not merely £1000, but £4338, 16s. It is quite true that the executors, in construing the bequest, seem to have gone upon no fixed principle, for while they refuse to pay to the pursuer, a blacksmith, the legacy, they have paid it to David Bayne, a carpenter, who stands in precisely the same position as the pursuer. In like manner they have recognised the claim of a forester and of a farm grieve.

"No explanation was given to the Lord Ordinary of the grounds on which the defenders paid the legacy to the forester and the farm grieve; but as to the carpenter, the Lord Ordinary was told that he was a favoured servant of Sir William, that his advice was very often asked, and that he was frequently in the company of his master; and the executors, in consequence, held that Sir William could not intend to pass over a servant so privileged and respected. Holding all this to be the fact, just look to what a conclusion it leads. Sir William, instead of distinguishing this favoured servant by leaving to him specially a legacy of a sum of money, brought him in simply as one of the class of *servants;* and if he did so with regard to him, he did so with regard to every other person, such as the pursuer, who stands in the same position as the carpenter. The Court is not bound by the construction put upon the will by the executors; but unquestionably if the judgment of the Lord Ordinary in this case be right, the payment of a legacy of £100 to that carpenter was wrong. It is possible enough that the testator did contemplate leaving such persons as the carpenter a legacy of a year's wages, and that he miscalculated the amount that would be necessary to meet his bequests,—not remembering at the time the number of persons in his employment. The very words that he uses—'say £1000,'—show that he was guessing. But the great discrepancy between that sum and the £4338 necessary to pay legacies to all the servants in his employment,—using the word 'servants' in its juridical sense,—shows that he only had in view the domestic servants, like the butlers and housekeepers, to whom he bequeathed specific sums of money, and who appear in the will immediately before the bequest 'to my *other* servants,' *i.e.* servants of the same domestic character.

"That the Court can look at the figures on the margin in order to ascertain intention, is a doctrine of which the Lord Ordinary has no doubt. If Sir William Stirling Maxwell had written on the margin an explanation of the language employed in the will, that explanation could be looked to as interpreting the language he used in the will; and if the figures that he has put on the margin in any way contribute to the interpretation of his intentions, they can be read and given effect to; and by the judgment which the Lord Ordinary has now pronounced he has given effect to them in such a way that if it had not been for these figures he would have sustained the claim of the pursuer.

"The Lord Ordinary has not found the defenders entitled to expenses, because he was informed that the present was a test case, and that it was desirable to have a judgment of the Court for the guidance of the executors."

The pursuer reclaimed and argued—The Lord Ordinary in proceeding on the pencilled notes on the margin was wrong—(1) because it being unsigned, it was not competent to look at them to control the text (*Caledonian Railway Company* v. *Fraser*, *ante*, vol. xi. 345), and (2) because no conclusion as to the class of servants whom the testator meant to include could be drawn from them, for they were as far above the amount required to satisfy legacies to domestic

servants as they were below that which would be needed if all servants who had been four years in his service when he died were included. Pursuer was not under an obligation to say how far it should be extended, but only to show that it included himself. It was not disputed that he was a servant of the testator paid by regular wages. The real test, then, was the limit of time in the service which the pursuer stipulated. In none of the cases quoted by defenders or the Lord Ordinary did an example of any such limit occur —*Thrupp* v. *Collett*, 26 Beavan 147; *M'Intyre* v. *Fairrie's Trs.*, cited by the Lord Ordinary.

The defenders replied—In all the authorities, chiefly in England, on questions relating to such legacies, they had always been held limited to servants in the family hired by the year—*Booth* v. *Dean*, 1 Myl. and Keen, 560; *Blackwell* v. *Pennant*, 9 Hare's Chan. Rep. 551; *Breslin* v. *Waldron*, 14 Ir. Chan. Rep. 333. The Lord Ordinary was right in limiting it to domestic servants, and in looking to the marginal note. It was true that £1000 was in excess of that required to satisfy all strictly domestic servants, but it was just as much short of the alternative estimate. The executors were not entitled to read the bequest so as to require the larger sum, and were within their rights in reading it to mean the smaller one. In putting that sum the testator was only making a rough guess, and meant to have a wide margin so as to cover easily all legacies to the class to which he must have meant to limit his bounty, viz., family servants, under which category the pursuer did not come.

At advising—

Lord Justice-Clerk—As this will stands, and apart from the marginal addition made by the testator, I cannot see any room for doubt that this blacksmith—who had been engaged by Sir William Maxwell at so much a-week, and was bound to give his whole time for these wages, having been four years in Sir William's service at the time of his death—was within the words of the bequest. After an enumeration of certain persons in his service to whom legacies were to be given, he says—"to each of my other servants who shall be in my service at the time of my death, and who shall have been with me for four years, one year's wages." The question is, What is a servant in the sense of that clause? It appears to me that a person who is bound to give his whole time for weekly wages clearly is included, and that any such person is entitled to receive a year's wages whether he is engaged for a whole year or not. The expression "one year's wages" points out the amount but not the quality of the persons who are to receive legacies; all persons paid by wages are, as I think, to receive the amount of wages they would have earned in a year whether they were engaged by the year or not.

It is suggested, in the first place, that the words used indicate domestic or family servants, and that that meaning has been impressed upon these words by the English authorities cited. Even if that were the construction, it does not follow that although a person is employed outside the house he does not therefore fall under the category of domestic servant. A familiar instance is a coachman. But I do not think that the words have been so limited. I think that a sounder interpretation of the words would be "belonging to the domestic establishment," and if that is taken as a test I think it clear that the pursuer is included. But again, it is said that here the testator in the marginal addition has estimated the amount to be paid under this head. I do not say such an addition cannot be looked at to any effect; but we know very little about these additions. We do not know when they were made, or how long before the testator's death. He died at Venice, having been abroad for a considerable time, and we cannot tell what alterations may have been made in his establishment after these words were written and before his death. But the estimate is necessarily so vague that I think it cannot affect the question. On the whole matter I am of opinion that the benefit here is given to all persons employed for wages, and the amount is the amount of a year's wages.

Lord Young—I am of the same opinion. The Lord Ordinary says, and I agree with him, that there can be no question that "the pursuer was a servant of Sir William Stirling Maxwell at the time of his death." He says in another passage where he is explaining the grounds of his judgment—"Sir William Stirling Maxwell did not use the word 'domestic,' but the Lord Ordinary thinks that he meant it, and that the legacy must be confined to that class of servants," and he is of opinion that the pursuer is not one of that class. I do not think it necessary to determine whether he is or not, although I may say that I do not think it by any means clear that a blacksmith employed in the service of a family at weekly wages is other than a domestic servant. There was in old French households an officer called the "maréchal ferrant," whose duty it was to see that the horses were properly shod. I should hesitate to say that he was not a domestic servant. But I think it is not necessary to determine that. This blacksmith is a servant, part of the establishment, engaged by the year, although paid monthly, and he had been in the service for four years. The Lord Ordinary says his reasons—for he gives none himself for holding this man not to be a domestic servant—for holding that the testator meant to limit his bounty to domestic servants, though he did not use that qualifying word, is that he finds on the margin of the deed a note, "say £1000," signifying that the testator had made some sort of calculation that the legacies he intended to give would amount to about £1000, and that while that sum would be pretty nearly the required amount if the class benefitted were limited to domestic servants, it would be only about a fourth of the required amount if the class was extended to other than domestic servants. Now, if any effect is to be given to this marginal addition—and I do not well see how it can—I do not follow the Lord Ordinary's reasoning from it. In the first place, the testator cannot have made anything more than a mere guess as to the number of servants who would have been in his service for four years at the time of his death. I cannot say with the least confidence that this guess was made with reference to domestic servants only, for the estimate is wrong in either view—a long way in excess if limited to domestic servants only, and a long way short if extended to farm labourers. But I do not think the extension of it to farm labourers in scores is a neces-

sary result of extending it to servants of the testator's establishment like the pursuer. I do not think any intention to limit the class of servants who benefitted can be drawn from that marginal jotting at all. But even if it could, I do not think that a properly executed deed can be affected by any such addition which is unauthenticated. It is not necessary, however, to determine that now if my other view be right that no inference whatever of an intention to point out a particular class of servants can be drawn from this marginal jotting at all. But I think further that it is quite clear that he did not mean to limit his bounty to domestic servants, for the first one on the list—the factor—is not in any way a domestic servant; he is the leading legatee of the class to be benefitted under this head of the will, which is wound up by a bequest to "other servants." I think that expression as thus used would have extended to a secretary, certainly to a librarian, to a piper—if the piper would condescend to be anything but master—in short, to anyone who had been employed in his establishment and in his service for four years before his death. But this view does not by any means signify that he meant it to extend to the labourers on his estates who were paid daily wages, even though they had been employed regularly in his service for four years before he died. I think there is a manifest distinction between servants on his establishment and labourers on his estates. But it is not our business to draw the line or give a precise definition which shall include "servants" as used here, and exclude all others. It is enough to find that the testator meant it to include such a servant as the pursuer, who I think is entitled to prevail, and receive his legacy.

Lord Craighill—I entirely concur. The testator here says "to each of my other servants who shall be in my service at the time of my death, and who shall have been with me for four years, one year's wages," and the question is, What was his intention? If the defenders can show that he meant to limit this legacy to a particular class of servants in which the pursuer is not included, then undoubtedly he must fail in his claim. But the opinion which I have formed from reading the clause is that the testator did not mean to limit these legacies to one particular class of servants, but that it was his purpose that they should extend to servants of more than one class, who had been four years in his service at the time of his death. The question then is, Was this blacksmith one of those whom he intended to benefit? The Lord Ordinary's view is that the clause in the will is controlled by the note on the margin, and that the result of giving effect to that note is to exclude the pursuer's claim. I agree with Lord Young that the words of the will cannot be affected or controlled by such an unauthenticated writing on the margin. But we do not require to decide that, for the figures will not suit either the construction of the pursuer, or that of the defenders; the calculation will not square with the one interpretation on the other. Besides, we do not know when it was made, or what was the number of the testator's servants when it was made, and if we do not know then we cannot tell on what basis the calculation was made. Unless we have as a condition of our interpretation the number of servants of each class in the testator's service at the time the calculation was made, we cannot say on the inclusion or exclusion of what classes of servants it was based, and so must disregard these figures altogether. On the whole matter, therefore, I think the pursuer is entitled to his legacy.

Lord Rutherfurd Clark—I have had some difficulty with this case, but am inclined to agree with your Lordships.

The Court recalled the Lord Ordinary's interlocutor and ordained the defenders to pay to the pursuer the sum of £59, 16s.

Counsel for Pursuer (Reclaimer)—Rhind—R. K. Galloway. Agents—M'Caskie & Hutton, S.S.C.

Counsel for Defenders (Respondents)—J. P. B. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

Thursday, May 22.

SECOND DIVISION.

[Lord Adam, Ordinary.

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF PERTH *v.* THE NORTH BRITISH RAILWAY COMPANY.

Statute—Statutory Obligation to Perform an Act where no Time of Performance Expressed—Act 44 *and* 45 *Vict. c.* 137 (*The North British Railway* (*New Tay Viaduct*) *Act* 1881), *sec.* 21 *—Obligation to Perform Act "to Satisfaction of Board of Trade"—Jurisdiction.*

Section 21 of the above Act, which was obtained by the North British Railway for authority to erect a bridge over the Tay higher up the river than one which had been blown down in 1879, provided—"The company shall abandon and cause to be disused as a railway so much of the North British Railway as lies between the respective points of junction therewith of railway No. 1 and railway No. 2, and shall remove the ruins and debris of the old bridge, and all obstructions interfering with the navigation caused by the old bridge, to the satisfaction of the Board of Trade." *Held* (*diss.* Lord Young) (1) that the obligation so imposed ran from the passing of the Act; (2) that the Court had jurisdiction to order implement of it, the reference to the Board of Trade merely pointing to the duty imposed on them to see that the obligation was properly discharged; and (3) that equitable considerations of conveniency suggested the limiting the removal to those portions of the bridge which were not connected with either side of the river by a continuous railway.

In 1870 the North British Railway Company introduced a bill into Parliament for authority to construct a railway with a bridge for carrying it over the river or Firth of Tay above Dundee. The bill was opposed by the Magistrates and Council of Perth as the conservators of the river